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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-599

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MASTERS, MATES AND PILOTS PENSION PLAN,
Petitioner,

v.

WILLIAM F. DEAK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In their brief in opposition to our petition for certiorari, plaintiffs' desperate effort to sustain their limited success below contains misstatements of the facts and the record below, and mischaracterizes our argument and the effect of the decision of the Court of Appeals. This reply directs itself only to the more egregious of the points¹ since we believe that the principal petition for writ of certiorari establishes the settled law which requires re-

¹ One factual misstatement requires comment. The six month post-employment period of suspension predated the Plan amendments in issue. The Trial Court specifically permitted that period of suspension to be enforced. (App. pp. 36a, 37a, 40a-41a)

view of the decision below, and suggests that it should be reversed. We believe the correct interpretation of *Robinson* and its application to this case is adequately addressed in our petition and will not be restricted here.

- 1. Review is not sought because of factual issues; the Eleventh Circuit's erroneous application of *Robinson* is of substantial importance beyond the facts of this case.**

Plaintiffs contend that the facts of this case do not rise to the level to warrant this Court's review. While factual considerations may have some weight, the real issue, for which review is sought, is the correct application of this Court's decision in *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). The decision of the Eleventh Circuit clearly conflicts with interpretation and application by the other Courts of Appeal which have considered this issue: *United Mineworkers of America v. Helen Mining Co.*, 762 F.2d 1155 (3rd Cir. 1985); *Short v. United Mineworkers of American 1950 Pension Trust*, 728 F.2d 528 (DC Cir. 1984); and *Central Tool Company v. IAM National Pension Fund, Benefit Plan A*, 811 F.2d 651 (DC. Cir. 1987). Had those cases been followed, the "unique factual issues" would not have been reached. It is the Eleventh Circuit's consideration of those facts at the beginning, rather than at the end, if at all, which requires review and correction by this Court.

- 2. The Court of Appeals clearly considered and passed on the *Robinson* contention; its erroneous application of *Robinson* should be considered by this Court.**

Plaintiffs contend that the *Robinson* defense was not properly preserved for appellate review. The Eleventh Circuit considered that objection, but nonetheless addressed the *Robinson* issue. In doing so, it wrongly interpreted *Robinson*, concluding that the *Robinson* defense would not obtain where the provision was improperly

motivated. As noted in our petition, we believe that the issue of motivation should not be reached unless the Court concludes that the provision in question is independently unlawful, or is not required by the provisions of the collective bargaining agreement. Both the District Court and the Court of Appeals concluded that the provision was not independently unlawful, and the Court of Appeals clearly found that it was required by the collective bargaining agreement. Since it is the failure of the Court of Appeals to end its inquiry for which review is sought, any perceived deficiency in the presentation to the trial court should not preclude review.

3. The *Chambless* case should not preclude review of the *Robinson* issues in the instant case.

Plaintiffs rely on the discussion by the District Court in *Chambless v. Masters, Mates and Pilots Pension*, 571 F.Supp. 1430, 1443-44, n. 21 (S.D. N.Y. 1983) as somehow precluding review by this Court of the *Robinson* issues. Such is in error. As noted in the opinion of the Court of Appeals, reported at 772 F.2d 1032 (2d Cir. 1985) the *Robinson* issue considered by the Second Circuit of Appeals focused on a different rule, Plan Amendment No. 47, which related to the amount of pension benefit, and which the Court found was not required by the collective bargaining agreement. As we noted in our petition, neither the Plan nor *Chambless* raised *Robinson* issues in their petition to this Court. Accordingly, since neither the Second Circuit nor this Court considered the *Robinson* issue with respect to Amendment 46, (which the Eleventh Circuit found *was* required by the collective bargaining agreement), there is no basis for this Court to be precluded from correcting the error of the Eleventh Circuit.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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